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CHAPTER 48

FRAGMENTATION AND CONSTITUTIONALIZATION

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1 INTRODUCTION

FRAGMENTATION and constitutionalization, understood as processes, seem to be two trends in the evolution of international law. Because both are a matter of degree and are not linear developments, the empirical claim that one or both phenomena are legally relevant beyond minimal or anecdotal episodes is contested. Moreover, each phenomenon is evaluated differently (for example, as constituting a risk or opportunity for international law as a whole) by different observers. The diverging assessments are to some extent pre-shaped by the fact that both fragmentation and constitutionalization are inevitably descriptive-evaluative—and thus loaded—terms. ‘Fragmentation’ has a negative connotation, and is used as a pejorative term (rather than diversity, specialization, or pluralism). ‘Constitutionalization’, in contrast, feeds on the positive ring of the concept of constitution. Finally, both constitutionalization and fragmentation are terms that describe not only legal processes in the real world of law but are also labels for the accompanying discourses (mostly among academics, less so among judges, and even less so among political law-making actors). The putative trends so far do not have a clearly definable end-result, such as a completely fragmented international legal order on the one hand, or a world constitution on

the other. Rather, the state of the law resulting from these processes is in itself a matter of contestable conceptualization.

2 FRAGMENTATION

2.1 Evolution

The term ‘fragmentation of international law’ denotes both a process and the result of that process, namely a (relatively) fragmented state of the law. The diagnosis refers to the dynamic growth of new and specialized sub-fields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations (NGOs), and multinational corporations) and to new types of international norms outside the acknowledged sources.

The evolution was triggered by the break-down of the communist bloc in 1989 which brought to an end the stable bipolar world order. In the wake of the post-Cold War ‘new world order’ (to use United States (US) President George HW Bush’s term), a host of multilateral treaties were concluded: the *Rio Conventions* and numerous hard and soft environmental instruments were adopted in 1992, the membership of the *ICSID Convention* and the number of bilateral investment treaties exploded.¹ New organizations and other permanent international bodies were founded, such as the World Trade Organization (WTO) in 1994. New international courts and tribunals were established, in particular the Yugoslavia and other ad hoc international criminal tribunals (1992 onwards), the WTO dispute settlement body (1994), the International Criminal Court (ICC) (created by the *Rome Statute* in 1998 and functional since 2003),² and the International Tribunal for the Law of the Sea (1996). Investment arbitration increased dramatically, and the European Court of Human Rights (ECtHR) was transformed into a permanent Court with direct access for individuals in 1998.

By the end of the 1990s, the ‘proliferation’³ of these international dispute settlement institutions gave rise to a fear that specialized courts and tribunals bodies

¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.

² *Rome Statute of the International Criminal Court* (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

³ ‘Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle’ (1999) 31 *New York University Journal of International Law and Politics* 679–933.

would ‘develop greater variations in their determinations of general international law’ and thereby ‘damage the coherence of the international legal system’.⁴ This concern was most prominently voiced by the then President of the International Court of Justice (ICJ), Judge Gilbert Guillaume, in his speech to the UN General Assembly in 2001.⁵ The articulation of this ‘problem’ by that office-holder was later criticized as a hegemonic attempt of a professional to preserve the power of the World Court.⁶

Against this background, the International Law Commission tackled the topic in 2000,⁷ and a study group was established that issued successive reports.⁸ The heyday of the academic fragmentation debate was the first decade of the new millennium. Pierre-Marie Dupuy devoted his 2000 General Course in the Hague Summer Academy to the issue.⁹ A symposium on ‘diversity or cacophony’ was held at Michigan Law School and resulted in a 500 page journal issue in 2004.¹⁰ In 2007 still, fragmentation was ‘le sujet à la mode’.¹¹ But by 2015, the constatation was: ‘farewell to fragmentation’.¹²

2.2 Causes

The causes of fragmentation seem to be both functional and political. First of all, fragmentation is built into the decentralized structure of international law which results from the absence of a central world legislator. Secondly, and connected to the first cause, fragmentation originates in the domestic

⁴ JI Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *Recueil des Cours* 101–382, at 371.

⁵ G Guillaume, ‘Speech by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations’ (30 October 2001) <<http://www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1>> [accessed 3 March 2016].

⁶ See eg M Prost, *The Concept of Unity in International Law* (Hart Oxford 2012) at 202–9.

⁷ As a first text, see G Hafner, ‘Risks Ensuing from Fragmentation of International Law’ (2000) *Yearbook of the International Law Commission* vol 2, pt 2, annex, at 143–50.

⁸ International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (13 April 2006) UN Doc A/CN.4/L.682; International Law Commission, ‘Draft Conclusion of the Work of the Study Group’ (2 May 2006) UN Doc A/CN.4/L.682/Add.1; International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (18 July 2006) UN Doc A/CN.4/L.702.

⁹ P-M Dupuy, ‘L’unité de l’ordre juridique international’ (2002) 297 *Recueil des Cours* 9–490.

¹⁰ ‘Symposium: Diversity or Cacophony: New Sources of Norms in International Law’ (2004) 25 *Michigan Journal of International Law* 845–1375.

¹¹ B Conforti, ‘L’Unité et fragmentation du droit international: “Glissez, mortels, n’appuyez pas!”’ (2007) 111 *Revue générale de droit international public* 5–18, at 5–10.

¹² M Andenas and E Bjorge (eds) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP Cambridge 2015).

sphere: different issue areas are handled by different departments of government which negotiate different treaties, and different administrative authorities then apply them. Thirdly, fragmentation is a response to globalization. Global problems (ranging from climate deterioration to migration and terrorism to the financial crisis) have triggered a demand for more international—and also more specialized—regulation.

From the perspective of global constitutionalism, the political causes may be more interesting. Realist analyses have depicted fragmentation as the result of a deliberate agenda of powerful States. Benvenisti and Downs have argued that fragmentation serves the latter's interests because it limits the bargaining power of weaker states (which cannot group up within one forum but are isolated in a multitude of settings) and because only those states with a greater 'agenda-setting power' can easily create alternative regimes which suit their interests better.¹³ While it is not clear whether Benvenisti and Downs have—beyond the anecdotal examples given—revealed a behavioural pattern that is strategically motivated and in fact has hegemonic effects,¹⁴ their analysis has the merit of politicizing the seemingly technical fragmentation debate.

2.3 Risks and Opportunities

Fragmentation (and the pluralism that accompanies it) may enhance both the effectiveness and the legitimacy of international law and its application—but only when it is channelled by constitutional principles and procedures. On the other hand, the institutional, procedural, and substantive diversification called 'fragmentation' indeed bears risks. The most important one is a loss of coherence which in turn implies the loss of international law's quality as a legal order (or system). An agglomeration of isolated and diverse norms does not amount to a legal order.¹⁵ A legal order is present only when norms refer to each other (ordered norms). But legal order means not only ordered law but also order through law. These two dimensions are mutually reinforcing: the normative pull of international law is fortified by its stringency and consistency. Understanding this interrelationship means understanding why consistency is particularly important for international law (more so than for domestic law): because its normative power is more precarious.

¹³ E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595–631, at 615.

¹⁴ Critically M Zürn and B Faude, 'On Fragmentation, Differentiation and Coordination' (2013) 13 *Global Environmental Politics* 119–30, at 125–6.

¹⁵ HLA Hart, *The Concept of Law* (PA Bullock and J Raz eds) (3rd edn Clarendon Press Oxford 2012 [1961]) at 234.

So what is at stake in fragmentation is unity, harmony, cohesion, order, and—concomitantly—the quality of international law as law. It is (too) easy to psychologize and thereby disparage these concerns as a ‘postmodern anxiety’ in a world which has lost stable values.¹⁶ Rather, the justified concern is that international law could ‘no longer be a singular endeavor, ... but merely an empty rhetorical device that loosely describes the ambit of the various discourses in question’.¹⁷ Without some glue holding together the ‘special regimes’ and ‘institutional components’, writes Georges Abi-Saab, ‘the special regime becomes a legal order unto itself—a kind of legal Frankenstein’ that ‘no longer partakes in the same basis of legitimacy and formal standards of pertinence’.¹⁸ So ultimately, at the bottom of the fragmentation debate lies, just as in the constitutionalization debate, a concern for a loss of legitimacy of international law, a loss which will ultimately threaten that law’s very existence.

3 CONSTITUTIONALIZATION

3.1 Key Terms

The debate on constitutionalization suffers from the great variety of meanings assigned to its key terms. I will here use *constitutionalization* as the label for the evolution from an international order based on some organizing principles such as state sovereignty, territorial integrity, and consensualism to an international legal order which acknowledges and has creatively appropriated and—importantly—modified principles, institutions, and procedures of constitutionalism.

Global constitutionalism is an intellectual movement which both reconstructs some features and functions of international law (in the interplay with domestic law) as ‘constitutional’ and even ‘constitutionalist’ (positive analysis), and also seeks to provide arguments for their further development in a specific direction (normative analysis). The function of constitutional law normally is to found, to organize, to integrate and to stabilize a political community, to contain political

¹⁶ See M Koskenniemi and P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 533–79.

¹⁷ M Craven, ‘Unity, Diversity, and the Fragmentation of International Law’ (2003) 14 *Finnish Yearbook of International Law* 3–34, at 5.

¹⁸ G Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 *New York University Journal of International Law and Politics* 919–33, at 926.

power, to provide normative guidance, and to regulate the governance activities of law-making, law-application, and law-enforcement. The desired constitutionalist elements are notably the rule of law, containment of political (and possibly economic) power through checks and balances, fundamental rights protection, accountability, democracy (or proxies such as participation, inclusion, deliberation, and transparency), and solidarity.¹⁹

Importantly, the constitutionalization of international law is accompanied and co-constituted by the *internationalization* (or globalization) of state constitutions consisting in the (re-)importation of international precepts (such as human rights standards) into national constitutional texts and case law, which simultaneously brings about a ‘horizontal’ convergence of national constitutional law.²⁰

The scattered legal texts and case law together might form a body of *global constitutional law*,²¹ a specific subset of law, drawing both on international law and on domestic law, which has a particular normative ‘constitutional’ status, and the abovementioned specific ‘constitutional’ functions. This body is not united in one single document called ‘world constitution’. Global constitutional law instead consists of fundamental norms which serve a constitutional function for the international legal system at large or for specific international organizations or regimes, as well as norms that have taken over or reinforce constitutional functions of domestic law.²²

3.2 Key Debates

Historically speaking, the constitutionalization debate is full of false friends. Although the concept of a ‘constitution of the international legal community’ had been spelled out in the interwar period by the Austrian Alfred Verdross,²³ that conceptualization is not at the roots of the contemporary debate.²⁴ In the 1990s, eminent German authors diagnosed an erosion of the consent principle (and hence an erosion

¹⁹ Matthias Kumm and others have called the ‘commitment to human rights, democracy, and the rule of law’ the ‘trinitarian mantra of the constitutionalist faith’: M Kumm et al., ‘How Large is the World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* 1–8, at 3.

²⁰ A Peters, ‘The Globalisation of State Constitutions’ in J Nijman and A Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (OUP Oxford 2007) 251–308.

²¹ I use the term ‘global’ and ‘international’ interchangeably, although the former denotes better the multilevel quality of the body of constitutional law at stake.

²² T Kleinlein and A Peters, ‘International Constitutional Law’ in A Carty (ed), *Oxford Bibliographies in International Law* (OUP Oxford 2014) <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0039.xml>> [accessed 3 March 2016].

²³ A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer Wien 1926).

²⁴ See E Lagrange, ‘Retour sur un classique: A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* 1926’ (2008) 112 *Revue générale de droit international public* 973–84.

of state sovereignty) and a rise of the ‘international community’.²⁵ These writings are (maybe against the authors’ intentions) in hindsight considered as the initiators of the contemporary debate. Ironically, the *topos* of constitutionalization at that time appeared in the law of international organizations whose founding documents have long been understood to be both treaties and constitutions²⁶—and thus within sectoral, possibly fragmented regimes. The ICJ described the documents’ hybridity as follows: ‘[f]rom a formal standpoint, the constituent instruments of international organizations are multilateral treaties... But the constituent instruments of international organizations are also treaties of a particular type’.²⁷ These debates referred to the United Nations (UN), the European Union (EU), and the WTO. But the structural features of those regimes which are pinpointed as being ‘constitutional’ actually differ dramatically from organization to organization, and accordingly the meaning of ‘constitutionalization’ of the respective regimes differs widely as well.

Some variants of constitutionalism beyond the state are extremely diluted, when constitutionalism is considered not as a matter of positive norms and ‘doctrine’, but (only) as a discourse and a vocabulary with a symbolic value, as a constitutionalist ‘imagination’.²⁸ Other strands of the debate relate less to international law proper and rather more to the constitutional law of states, constitutional comparison, borrowing, and migration. Two journals, the *Journal of International Constitutional Law* or *ICON* (founded in 2002) and the *Journal of Global Constitutionalism* (founded in 2011) are forums for this strand. To the extent that constitutionalization covers both international law and domestic law, and is to that extent inevitably a multilevel phenomenon in which the various levels of law and governance may also compensate for each others’ deficiencies (‘compensatory constitutionalism’²⁹

²⁵ B Simma, ‘From Bilateralism to Community Interests in International Law’ (1994) 250 *Recueil des Cours* 217–384; C Tomuschat, ‘Obligations Arising for States without or against their Will’ (1993) 241 *Recueil des Cours* 195–374, at 209–40. Simma is a ‘disciple’ of Verdross.

²⁶ A Peters, ‘Das Gründungsdokument internationaler Organisationen als Verfassungsvertrag’ (2013) 68 *Zeitschrift für öffentliches Recht* 1–57. See also A Peters, ‘The Constitutionalisation of International Organisations’ in N Walker, J Shaw, and S Tierney (eds), *Europe’s Constitutional Mosaic* (Hart Oxford 2011) 253–85.

²⁷ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, at [19]. For the official terms, see *Constitution of the United Nations Educational, Scientific and Cultural Organization* (signed 16 November 1945, entered into force 4 November 1946) 4 UNTS 52; *Constitution of the World Health Organization* (signed 22 July 1946, entered into force 7 April 1948) 4 UNTS 221; *Constitution of the International Labour Organization* (signed 9 October 1946 entered into force 28 May 1947) 38 UNTS 583; *Constitution of the Food and Agricultural Organization of the United Nations* (signed 16 October 1945 adopted) [1946–7] *United Nations Yearbook* 693; *Constitution of the International Telecommunication Union* (signed 22 December 1992, entered into force 1 July 1994) 1825 UNTS 330. The aborted *Treaty Establishing a Constitution for Europe* (signed 29 October 2004) OJ 2004 C/310/1 had captured the hybridity in its official name.

²⁸ N Walker, ‘Constitutionalism and Pluralism in Global Context’ in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Oxford 2011) 17–37.

²⁹ A Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 579–610.

or 'supplementary constitutionalism'³⁰), these discourses form part of the broader stream of constitutionalization too.

The constitutionalization debate has been initiated in continental Europe.³¹ The early debate was strong among German public lawyers, not least due to their obsession with the state and initial doubts about severing the concept of the constitution from the state.³² The discussion has meanwhile been picked up in the United Kingdom (UK),³³ in the US,³⁴ and in Japan.³⁵ The ideational background of the proponents of global constitutionalism may be a more or less openly Catholic (neo)jus-naturalism,³⁶ cosmopolitanism,³⁷ republicanism,³⁸ general systems theory,³⁹ discourse theory,⁴⁰ functionalism⁴¹ and constitutional economics,⁴² social constructivism,⁴³ social contract theory,⁴⁴ critical legal studies,⁴⁵ or agnostic. The co-existence of highly divergent

³⁰ J Dunoff and J Trachtman, 'A Functional Approach to International Constitutionalization' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP Cambridge 2009) 3–35, at 14–18.

³¹ J Klabbers, A Peters, and G Ulfstein, *The Constitutionalization of International Law* (expanded edn OUP Oxford 2011).

³² See especially D Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282–307.

³³ 'Constitutionalism and Pluralism in Global Context' (n 28).

³⁴ 'A Functional Approach to International Constitutionalization' (n 30).

³⁵ T Mogami, 'Towards *Jus Contra Oligarchiam*: A Note on Critical Constitutionalism' (2012) 55 *Japanese Yearbook of International Law* 371–402.

³⁶ AA Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium*: Part I' (2005) 316 *Recueil des Cours* 9–444; R Domingo, *The New Global Law* (CUP Cambridge 2010). Verdross would have to be counted here, too: see *Die Verfassung der Völkerrechtsgemeinschaft* (n 23).

³⁷ Habermas used Kant's concept of a 'cosmopolitan status' ('*weltbürgerlicher Zustand*') to demand the transformation of international law into a law of and for the global citizen: J Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' in *The Divided West* (C Cronin ed and trans) (Polity Press Cambridge 2006) 115–210; D Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton University Press Princeton 2008); M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in *Ruling the World? Constitutionalism, International Law, and Global Governance* (n 30) 258–324; G Wallace Brown, 'The Constitutionalization of What?' (2012) 1 *Global Constitutionalism* 201–28.

³⁸ A Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot Berlin 2007).

³⁹ G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP Oxford 2012).

⁴⁰ T Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer Berlin 2012).

⁴¹ 'A Functional Approach to International Constitutionalization' (n 30).

⁴² JP Trachtman, *The Future of International Law: Global Government* (CUP Cambridge 2013) ch 11 ('International Legal Constitutionalization').

⁴³ O Diggelmann and T Altwicker, 'Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 623–50.

⁴⁴ M Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 *European Journal of International Law* 177–99.

⁴⁵ CEJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Leiden 2011). The author propagates an 'organic constitutionalism' as a 'negative universal' based on Ernesto Laclau and Jacques Derrida: see especially at 158–65.

sources of inspiration on the one hand creates the danger of empty talk that is only seemingly a real discourse on an agreed topic. On the other hand, the pluralism of outlooks underlying the debate might be more positively assessed as demonstrating that global constitutionalism does not need a particular ideational foundation, but can build on an overlapping consensus.

3.3 Criticism

Sceptics of constitutionalization (as a phenomenon and as a label) often highlight the lack of ‘politics’ on the international plane (see also below Section 7).⁴⁶ For example, it is (correctly) pointed out that there ‘is no political movement in sight that would move the international system in a constitutional direction’, and that ‘[c]onstitutionalization talk is the denial of this situation’; it is just a vain attempt of ‘talking up the system’.⁴⁷ ‘[T]he constitutionalization of international law, qua compensation for the absence of such political power, becomes hoisted by its own petard and, hence, part of the mess that it set out to clean up’, writes Alexander Somek.⁴⁸

A related stance is the insistence on an intrinsic link between popular sovereignty and constitutionalism, all the while pointing out that the former element is absent in the international sphere.⁴⁹ To the extent that these objections associate ‘politics’ with ‘democracy’, they all lead to the conclusion that the absence of a genuine global *pouvoir constituant* (and/or the absence of a global democratic process) renders constitutionalization talk meaningless.

Finally, a fundamental pluralist critique is that the political, economic, intellectual, and moral diversity of the world population makes constitutionalism both unachievable and illegitimate. Any constitutional arrangement would be imposed by one group on the others, and would thus be perceived as an imperial tool rather than as an expression of common self-government.⁵⁰ But this critique is effectively countered by the concept of pluralist constitutionalism (see below Section 5.2), however difficult this might be to realize on a global scale.

⁴⁶ Cf P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP Oxford 2010).

⁴⁷ A Somek, ‘From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law’ (2011) 18 *Constellations* 567–88, at 578: constitutionalism is merely ‘re-description rather than reform’.

⁴⁸ *Ibid* 583.

⁴⁹ For Habermas, following Kant, a constitution deserving that name must be ‘republican’, established by the citizens to govern their affairs: ‘Does the Constitutionalization of International Law Still Have a Chance?’ (n 37) 133. Because this type of democratic foundation and a global political power to enforce the law are lacking on the international plane, international law as it stands is only a ‘proto-constitution’: *ibid*.

⁵⁰ N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP Oxford 2010) ch 2.

4 THE RELATIONSHIP OF THE DEBATES

Often the scholarly diagnosis of constitutionalization and the academic or political quest for reinforcing the putative trend is depicted as a conscious or subconscious reaction against fragmentation; as a quest (formulated mainly by scholars) to counter that fragmentation (perceived as a threat) and to remedy its (presumably negative) consequences: ‘constitutionalism as a means of solving fragmentation problems’.⁵¹ For example, Joel Trachtman notes ‘[i]n the fragmentation context, constitutionalization ... can be seen as a way of introducing hierarchy and order—or at least a set of coordinating mechanisms—into a chaotic system otherwise marked by proliferating institutions and norms’.⁵²

Some observers framing the debate in that way chastise the idea of global constitutionalism as a naïve desire to recreate unity and harmony in international law.⁵³ From that perspective, an international constitution is (erroneously) hailed by its protagonists as a remedy against the threat of fragmentation, as a (vain) attempt to preserve order, stability and values, while in reality pluralism bordering on chaos reigns.

Contrary to that stance, this contribution does not depict global constitutionalism as holistic and thus naïve, but seeks to highlight that fragmentation and constitutionalization (both as legal processes and as accompanying discourses) stand in a more sophisticated inter-relationship and are mutually constitutive: On the one hand, constitutionalization phenomena within international law have exacerbated fragmentation, because they have from the outset taken place at multiple sites, and have produced only constitutional fragments. On the other hand, fragmentation in turn has triggered new forms of constitutionalization in international law; the processes of fragmentation are themselves being ‘constitutionalized’. Put differently, constitutionalization (as a process) and global constitutionalism (as an intellectual framework) is profoundly shaping how law-appliers deal with fragmentation.

Moreover, both debates are largely motivated by a common root concern, namely the concern about the legitimacy⁵⁴ of international law. Both phenomena also share the merit of promoting contestation and politicization⁵⁵ within the

⁵¹ A van Aaken, ‘Defragmentation of Public International Law through Interpretation: A Methodological Proposal’ (2009) 16 *Indiana Journal of Global Legal Studies* 483–512, at 487. See also JG van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 *Leiden Journal of International Law* 277–304, at 284: ‘Constitutionalism’s anti-fragmentational virtue may indeed be said to represent its prime rationale, impetus, and driving force’.

⁵² *The Future of International Law: Global Government* (n 42) 251–2.

⁵³ See eg J Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31–58, at 49.

⁵⁴ I will revert to this in Section 8.

⁵⁵ See on politicization below in Section 7.

international legal process; they are kindred spirits. The remainder of this chapter will explore the relationship between fragmentation and constitutionalization in more detail.

5 FRAGMENTED CONSTITUTIONALIZATION

5.1 Constitutional Fragments

The co-existence of diverse regimes within international law, the disrupted and sometimes reversed constitutionalization processes, the multilevel quality of global constitutional law, and sectoral constitutionalization (of the UN, the EU, the WTO, the ECtHR, and so on); all these phenomena preclude any conceptualization of constitutionalization as the emergence of a 'super-constitution' which would lie both 'above' domestic state constitutions and which would engulf the separate international regimes, too. Rather, constitutionalization (if we want to speak of it) is itself fragmented. We see *constitutional fragments* in different issue areas of law and governance (and on different 'levels' of governance), which interact with each other, sometimes converging but also conflicting.⁵⁶ Besides, the intellectual framework of constitutionalism is fragmented, too.

But is the notion of fragmentary constitutionalization and fragmentary constitutionalism not a contradiction in terms (or at least a dilution which renders the terms meaningless)? When different organizations have their own constitution, how can they still be members of a global constitutional order? Can constitutionalization and constitutionalism only be uniform and complete, or not be at all? Indeed, traditional Continental and US-American constitutionalism tended to be holistic in a dual sense, namely that one single constitutional document was supposed to provide a both *harmonious* and *complete* legal and political basis for societal life.

However, in the multilevel governance arrangements under conditions of globalization, both features have waned. First, even state constitutions do not govern or regulate all governance acts unfolding effects for their citizens and within their territorial borders. Secondly, within constitutional states' sub units, for example states within federal states, or local communities, often have their own constitutions. Thirdly, in culturally diverse societies the value-bases of shared, implicit norms carrying the legal constitution are crumbling too. So while it is true that the

⁵⁶ *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 39) 52.

very idea of ‘fragmented’ (that is, multiple and multilevel) constitutionalism implicitly gives up the claim to totality, this idea better describes real-life phenomena (within and among states) than the more traditional holistic notion of constitution.

I submit that the abovementioned *multiple processes of constitutionalization* do not cancel each other out but are apt to co-exist, to reinforce each other and even mutually to compensate each others’ deficiencies. Global constitutionalism relates to multilevel governance, implying nested constitutional orders, and covering various subfields of the law. Besides, members of a global constitutional order, notably nation states and international organizations, may have their own sectoral constitution. Finally, constitutional substance may be dispersed ‘vertically’ across different levels of the law and ‘horizontally’ across areas of the law. Overall, this means that the existence, growth, and sometimes regression of multiple constitutions and of fragmented constitutional law can still be reasonably qualified as manifestations of constitutionalism.

5.2 Pluralist Constitutionalism

In terms of normative substance, constitutionalism (within states and beyond states) is not and should no longer be, as James Tully put it, ‘the empire of uniformity’.⁵⁷ Constitutionalism has been reconceptualized by Tully so as to ‘recognize and accommodate cultural diversity’.⁵⁸ This recasting is relevant for global constitutionalism, because global constitutionalism is conceivable, if at all, only as pluralist constitutionalism.⁵⁹ Pluralism is used here as a label for a normative position which welcomes the multiplicity, diversity, and overlap of legal (sub-)orders, of rules and principles, of sources of authority, of norm-producing actors and institutions in various sectors and levels of governance that stand in a non-hierarchical relationship to each other (in the absence of a meta-norm, an overarching *Grundnorm*, or the like, to resolve the competing claims for validity, authority, supremacy), and which also welcomes the plurality of values and perspectives espoused by the multiple actors. This type of pluralism may go hand in hand with constitutionalism.

Pluralism does not require ‘that each good should be pursued by an autonomous regime. It may well turn out that a relatively consolidated form of global constitutionalism, rather than unregulated global legal pluralism, is the best way to ensure

⁵⁷ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP Cambridge 1995) ch 5.

⁵⁸ *Ibid* 1 and 58.

⁵⁹ A Peters, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’ (2010) 65 *Zeitschrift für öffentliches Recht* 3–63. On ‘constitutional pluralism’, see also JL Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP Cambridge 2012) at ix, 45, 70.

a healthy pluralism of [human] values. Value fragmentation does not dictate institutional fragmentation'.⁶⁰

Most importantly, 'pluralism' alone is not sufficient as a guideline for ordering a society, because it does not say anything about its own limits. Some additional principles, whether democracy, individual freedom, equality, mutual respect, and so forth, are needed, otherwise, 'global legal pluralism might end up consecrating a ruthless world governed... by "nothing other than the advantage of the stronger"' law-applying institution.⁶¹ Therefore, constitutional principles and procedures are needed to constructively deal with pluralism (and fragmentation), notably to protect the weaker actors in international relations. To these we now turn.

6 CONSTITUTIONALIZING FRAGMENTATION

6.1 Processes and Techniques

The fragmentation of international law can be (better) managed, and its benefits can be harvested to the extent that it is constitutionalized. By 'constitutionalizing' fragmentation, we understand three processes. First, the substantive integration of some issue areas, inter alia, through accepting and applying common transversal ('constitutional') norms to accommodate multiplicity. Secondly, the strategy of developing and applying procedural techniques for creating compatibility of principles and rules stemming from different areas. Among these is the constitutional technique of balancing, which is applied to reconcile the competing spheres of autonomy of relevant actors (for example, states and international organizations). Thirdly and finally, the constitutionalization of fragmentation consists in the establishment (or reform) of bodies with a mandate to coordinate different treaties and regimes. This includes, importantly, a 'constitutional' 'framework of mutual recognition and contestation and of checks and balances between sites and their different claims to authority'.⁶² The principles, techniques, and bodies that deal with discrepancy, collisions, and conflict may appropriately be called 'constitutional' elements of the international legal order because they seek to create compatibility, not only in a 'negative' sense of preventing legal

⁶⁰ T Isiksel, 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constitutionalism* 160–95, at 190 (emphasis added).

⁶¹ *Ibid* 195 (citations omitted).

⁶² 'Constitutionalism and Pluralism in Global Context' (n 28) 29. See also *Globalization and Sovereignty* (n 59) 70.

conflicts, but also in a supportive, ‘positive’ sense of seeking to achieve the objectives of other treaties.

Perhaps the modest plea for *internalizing an outside perspective* is more important than institutional fixes. Gunther Teubner observes that the differentiation and autonomization of ‘systems’ (which seems to include the various international treaty regimes) has resulted in a ‘network architecture’ of transnational regimes.⁶³ The important analytical and normative point is that ‘each transnational regime needs to combine two contradictory requirements: all regimes spell out their own vision of a global public interest (from their own perspective), while all regimes ‘at the same time take account of the whole by transcending their individual perspectives’.⁶⁴ ‘Each regime must create the overarching *ordre public transnational* from its own perspective’, a ‘shared horizon of meaning’ needs to be constructed, a ‘counterfactual assumption of a *common normative core*’.⁶⁵ In international judicial practice, a companion to this approach is the ‘systemic outlook’ asked for by some judges.⁶⁶ It seems fair to say that the mentioned ‘common core’ is a kind of constitution.

6.2 Conflict Avoidance and Reconciliation

Beyond traditional conflict resolution maxims which lead to an ‘either/or’ application of norms, that is, those which constitute a relationship of mutual exclusiveness of treaties, a reconciliatory approach is now gaining ground. The clearest manifestation of this new approach is found in the three principles enounced in art 20 of the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) whose heading is: ‘Relationship to other treaties: mutual supportiveness, complementarity and non-subordination’.⁶⁷ These three principles seek to avoid the binary ‘either/or’ approach and instead favour the combined and cumulative application of international norms stemming from various treaties.

In the current legal process, law-applying bodies in fact first of all seek to avoid conflict by harmonizing the various international rules rooted in different

⁶³ *Constitutional Fragments: Societal Constitutionalism and Globalization* (n 39) ch 3 (‘Transnational Constitutional Subjects: Regimes, Organizations, Networks’).

⁶⁴ *Ibid* 161. ⁶⁵ *Ibid* (emphasis added).

⁶⁶ See *Whaling in the Antarctic (Australia v Japan)* (Merits) (ICJ, 31 March 2014) at [25] (Separate Opinion of Judge Cançado Trindade).

⁶⁷ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (opened for signature 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311. In this sense, see also *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (opened for signature 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208 preamble indent

regimes. This can be done with the help of a presumption of non-deviation.⁶⁸ But this presumption faces the same objection that can be raised against the *lex posterior* rule: without an identity of law-makers, the presumption has no basis in their actual intentions.

The presumption of conformity can be reasonably combined with the principle of mutual recognition, based on the idea of functional equivalence of the norms originating from different sources.⁶⁹ But this approach fits only when the norms in question do not point in opposite directions (for example, the free importation of animal products versus import restrictions on the basis of animal cruelty concerns), but when they strive towards the same goal, if with different nuances (for example, the protection of property, but in different degrees). The idea of mutual acknowledgement of functional equivalence could be extended beyond the protection of fundamental rights to other constitutional standards, such as the standards of democracy and of the rule of law.

6.3 Principle and Practice of 'Systemic Integration'

Currently the most discussed 'de-fragmentation' technique is the systemic interpretation of international norms. International law-applying bodies have often practised harmonious interpretation, while not necessarily relying on art 31(3)(c) of the *Vienna Convention on the Law of Treaties*,⁷⁰ the 'master-key' to the house of international law.⁷¹ Arguably, art 31 allows and even mandates treaty-interpreters to take into account all kinds of 'rules of international law': not only other treaty norms but also customary norms and possibly even soft law. 'Systemic integration' is adequate for the application of customary rules as well, for example for

9 (emphasis in original): 'Recognizing that trade and environment agreements should be mutually supportive...'

⁶⁸ *Al-Jedda v United Kingdom* (ECtHR, Grand Chamber, App No 27021/08, 7 July 2011) at [102]; *Nada v Switzerland* (ECtHR, Grand Chamber, App No 10593/08, 12 September 2012) at [169]–[172], [197]; *Stichting Mothers of Srebrenica v The Netherlands* (ECtHR, App No 65542/12, 11 June 2013) at [139].

⁶⁹ For this type of approach, see *Bosphorus v Ireland* (ECtHR, App No 45036/98, 30 June 2005) at [155]. On conflicts between EU law and national human rights protection, see *Solange II* (German Constitutional Court, BVerfGE 73, 22 October 1986) at 339 ff.

⁷⁰ *Oil Platforms (Islamic Republic of Iran v United States)* (Judgment) [2003] ICJ Rep 161, at [41]: art XX of the bilateral treaty on friendship between the US and Iran had to be interpreted (relying, inter alia, on art 31(3)(c) of the *Vienna Convention on the Law of Treaties* (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331) in the light of general international law, to the effect that the 'measures' there precluded an unlawful use of force by one party against the other.

⁷¹ This term was coined by now ICJ Judge Hanquin Shue when she still was an ILC member in debates in the ILC: see 'Draft Conclusion of the Work of the Study Group' (n 8) [420].

the identification of the scope of state immunity under due consideration for human rights.

The International Law Commission (ILC) qualifies the ‘principle of systemic integration’ as a constitutionalist device. That principle:

articulates the legal-institutional environment in view of *substantive preferences, distributionary choices and political objectives*. This articulation is...important for the critical and constructive development of international institutions...To hold those institutions as fully isolated from each other...is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a *general, public interest*. Without the principle of ‘systemic integration’ it would be impossible to give expression to and to keep alive, any *sense of the common good of humankind*, not reducible to the good of any particular institution or ‘regime’.⁷²

6.4 ‘Regime Interaction’ as Constitutionalization Lite

A pragmatic approach to curb the negative effects and make the most productive use of the potential benefits of fragmentation lies in the practice of treaty bodies or organizations to entertain contacts all the while refusing to lay down guidelines for the resolution of potential conflicts. The only minimal prerequisite for coordination and possibly cooperation seems to be information exchange—potentially with a view to identifying possible common goals (or sub-goals) and shared principles. This phenomenon of institutional contact has been called ‘regime interaction’.⁷³

This interaction may shape and develop international norms beyond the consent of member states. That law-developing activity therefore requires an additional basis of legitimacy. That basis can be (and is in fact already) created through *participation* (state parties, stakeholder and experts) and *information/reason-giving*.⁷⁴ While this framework for regime interaction falls short of ‘substantive’ constitutionalism, it does amount to a *procedural constitutionalization*, based on procedural principles of inclusion and transparency. Again, the constitutionalist perspective helps to understand and possibly develop the interaction of regimes not as a managerial problem but as a political issue. These principles are precisely apt to counteract the dominance of that regime which is in political terms more powerful than the competing one.

⁷² ‘Draft Conclusion of the Work of the Study Group’ (n 8) [480] (emphases added).

⁷³ MA Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP Cambridge 2012).

⁷⁴ MA Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP Cambridge 2011) at 255–6 and 279–80.

7 FRAGMENTATION, CONSTITUTIONALIZATION, AND POLITICIZATION

A common core concern in debates on both fragmentation and constitutionalization is ‘politics’, ‘politicization’, or the lack of both. In the context of fragmentation, ‘politicization’ is viewed, firstly, as the antidote to ‘managerialism’: ‘the various regimes or boxes—European law, trade law, human rights law, environmental law, investment law and so on’ pursue what Martti Koskenniemi has called ‘managerialism’:

Each regime understood as a purposive association and each institution with the task of realising it. . . . *Differentiation does not take place under any single political society.* Instead it works though a *struggle in which every interest is hegemonic*, seeking to describe the social world through its own vocabulary so that its own expertise and its own structural bias will become the rule.⁷⁵

A related, second theme is the insistence on the ‘political’ cause of fragmentation, namely its (again ‘hegemonic’) exploitation by powerful states (see above Section 2.2). Along this line it could be said that the specific lines of fragmentation and unity have ‘*ideological markings*’. Attempts to unify international law would only ‘alter the terms by which difference is already expressed and articulated and refragment the terrain along different lines’⁷⁶ (and thus merely express different politics).

A third variant of the topic of ‘politics’ emerged in reaction to the initial focus of the fragmentation debate on international courts and their possibly diverging case law which highlighted the predominance of courts in the international legal process. This diagnosis has been met with the argument that deep normative conflicts arising from the fragmentation of international law could and should be resolved ‘politically’ (by the global law-makers which are still mainly states) and not ‘technically’ (by international courts and tribunals).⁷⁷ The concern that global constitutionalism is too apolitical, or pretends to be above politics, exactly mirrors that debate. The constitutionalization discourse (pushed by judges and stylized by academics) condones (according to its critics) an impoverished, legalist, and in that sense apolitical conception of constitution.

The call for de-fragmentation and constitutionalization *through global ‘politics’* must be taken seriously. However, it suffers from the ambiguity of the terms ‘politics’ and ‘political’. International law might be said to be ‘too political’ in

⁷⁵ M Koskenniemi, ‘International Law: Between Fragmentation and Constitutionalism’ (Paper presented at The Australian National University, Canberra, 27 November 2006) [13]–[14] (emphasis added) <http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra_06c.pdf> [accessed 18 February 2016].

⁷⁶ ‘Unity, Diversity, and the Fragmentation of International Law’ (n 17) 34.

⁷⁷ ‘Draft Conclusion of the Work of the Study Group (n 8) [484].

the sense that the law often just follows the power-relations between states and does not create any strong normativity against politics. From that perspective, a relative ‘de-politicization’ of international relations (through constitutionalization) is beneficial, because the introduction of constitutional principles contributes to the stability of expectations, legal certainty, and to equal treatment of the relevant actors.

Rather, what is properly meant by the ‘lack of politics’ both in dealing with fragmentation and in constitutionalization is the lack of an international political process that would be *democratic* in a much stronger sense than it is now. So the pertinent point is that global governance suffers from democratic deficits and—to some extent correspondingly—from too powerful courts.

Importantly, global constitutionalism unveils precisely those deficits by introducing the constitutional vocabulary. The constitutional paradigm also inspires and eventually facilitates the search for remedies. The remedy against a too ‘legalist’ and too ‘judicial’ process of constitutionalization is not to stop that process, but to democratize it. Overall, because constitutional law is a branch of law which is very close to politics, and because constitutionalism is (also) a political, not simply an apolitical, project (although it does suggest that there is a sphere ‘above’ everyday politics), the call for constitutionalization and global constitutionalism can trigger contestation and politics instead of just pre-empting it.

8 CONCLUSION

International law is in fact less fragmented than suggested by the discourse on fragmentation. Empirical findings on the scarcity of conflicts, the prevailing scheme of parallelism and reconciliation of norms from different regimes, and the migration of norms from one regime to another suggest that the problems of fragmentation have been overstated.⁷⁸ The diversification of international legal regimes should be welcomed as manifesting the political will of law entrepreneurs and the capacity of international law to address a list of very diverse global problems. The emergence of special fields within international law has been a necessary response to the complexity of global society (independently of the possibility of exploitation by states with huge resources to negotiate and manage the multiple regimes).

⁷⁸ See eg G Marceau, A Izquierri, and V Labonnoy, ‘The WTO’s Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation’ (2013) 47 *Journal of World Trade* 481–575.

Although the lack of a central law-maker has (inevitably) led to the existence of multiple legal regimes with overlapping but not identical memberships, whose main objectives often stand in tension, the law-appliers (both treaty bodies and court) are careful not to contradict each other. The actual instances of completely irreconcilable norms and case law or of divergent interpretations of cross-cutting norms by different courts and tribunals have been exceedingly rare.⁷⁹ This is due, last but not least, to the harmonizing approaches and techniques of international courts which have been careful not to contradict themselves (at the price of being extremely parsimonious). Several judges have portrayed the so-called fragmentation of the international judiciary in a positive light.⁸⁰ For example, ICJ Judge Greenwood declared in a recent case:

International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.⁸¹

The current state of international law is more appropriately described as 'ordered pluralism',⁸² 'unitas multiplex',⁸³ or 'flexible diversity'.⁸⁴ As it is likely that the differentiation of international law will continue, the ongoing challenge for law-appliers and observers will be to refine principles, procedures, and institutions for coordinating, harmonizing, and integrating various international regimes.

Descriptively, the constitutional perspective usefully complements the fragmentation debate. It can well explain the international order as it stands *exactly because* of the international legal order's fragmented character:

[T]he time may have come when the concept of a constitution should be put at the forefront again, not because there was no constitution before—in fact... there has always been a constitution in international law—but because this concept is now more useful than ever in understanding and describing international law as it is today, that is a legal order which

⁷⁹ One example is the notion of 'control' in art 8 of the International Law Commission's Articles on State Responsibility: compare *Prosecutor v Tadić* (Judgment) (ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) at [117] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, at [406].

⁸⁰ R Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791–804; B Simma, 'Fragmentation in a Positive Light' (2004) 25 *Michigan Journal of International Law* 845–7.

⁸¹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea) (ICJ, 19 June 2012) at [8] (Declaration of Judge Greenwood).

⁸² M Delmas-Marty, *Le pluralisme ordonné* (Seuil Paris 2006).

⁸³ *The Concept of Unity in International Law* (n 6) 191.

⁸⁴ R Hofmann, 'Concluding Remarks' in A Zimmermann and R Hofmann (eds), *Unity and Diversity in International Law* (Duncker and Humblot Berlin 2006) 491–4, at 491.

has become more complex, *fragmented*, and difficult to conceptualize with such elementary concepts such as sovereignty and consent.⁸⁵

Put differently, global constitutionalism is a useful analytic lens for understanding how international law evolves and works, as long as it is understood as ‘thin’ (contending itself with procedures as opposed to substance), and multilevel (necessarily involving domestic constitutional law). Even if a global constitutionalism of this type stays (partly) outside the picture of international law proper, it will always be reproduced in the fragments of the international legal order.

Normatively, constitutionalism, just like other ‘defragmentation’ proposals, offers procedures and mechanisms to coordinate the working of specialized international legal bodies and to reconcile diverging rationales of the special branches of international law. It also offers some direction for resolving normative conflicts. However, traditional mechanisms of ordering (such as hierarchy) have been largely replaced by new mechanisms of stabilization. The quest for constitutionalization is, from that perspective, a call for improving the strategies of coordination of different legal fields and levels of law, for refining the techniques for the avoidance of conflict, and for designing clever mechanisms for resolving the unavoidable ones, in the absence of a clear normative hierarchy. In terms of a constitutional mindset, the relevant actors must be (at a minimum) willing ‘to justify interpretations of regional, global, or relevant domestic law in general rather than parochial terms’,⁸⁶ or to internalize specific outside perspectives. The constitutionalist paradigm also furnishes a yardstick for assessing the effectiveness and legitimacy of those mechanisms.

However, constitutionalism is currently in crisis, and the process of constitutionalization may be stagnating or retrogressing. That crisis affects both international and domestic constitutions. But far from rendering obsolete the discourse on global constitutionalism, the current constellation underscores its necessity. Importantly, the growing global welfare gap and the financial and economic crisis underscores the need for supplementing global constitutional law with more social, welfarist, or solidarity elements.

Fragmentation and constitutionalization debates can be viewed as two sides of the same coin. They have grown out of an overall concern for the legitimacy of the international legal system and its institutions, once the belief in state sovereignty as the necessary and sufficient basic principle had been lost. The constitutionalist approach seeks to regain that legitimacy by shifting the *Letztbegründung* from state sovereignty to human self-determination (rights, welfare, and democracy), by identifying and criticizing constitutional deficits of the international

⁸⁵ O de Frouville, ‘On the Theory of International Constitution’ in D Alland et al., (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Leiden 2014) 77–103, at 79 (emphasis added).

⁸⁶ *Globalization and Sovereignty* (n 59) 73.

order, and finally by reformulating constitutionalist principles and helping to implement them. From the other side, the fragmentation debate, notably in its second phase, has sought to tackle legitimacy deficits arising from internal contradictions and norm conflicts by suggesting coordinating devices. Overall, both debates turn around international law's legitimacy—in the sense of an external standard of propriety and fairness—while there are a broad range of views about the content of that standard, ranging from internal consistency (most clearly highlighted in the fragmentation debate) to democratic principles (often analysed in the constitutionalization debate).

The most important contribution of global constitutionalism (and of the fragmentation debate) is not to gloss over, deny, or de-politicize conflicts over values, principles, and priorities among international actors and participants in the global legal discourse, or to impose certain legal concepts in a hegemonic fashion. Instead, global constitutionalism has precisely pinpointed the politics that are at stake. The lens of global constitutionalism, if conceived as a genuinely pluralist framework, allows us to accept and re-assess fragmentation as a positive condition which manifests and facilitates the realization of the constitutional values of critique and contestation.